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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 94

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—against—

STORER BROADCASTING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute and regulation involved	2
Statement	4
Argument	6
Conclusion	17
Appendix	1a

CITATIONS

Cases:

Aladdin Radio and Television Inc., 9 Pike & Fischer R. R. 1	15
Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U. S. 327	7
Bamberger Broadcasting Service, Inc., 11 F. C. C. 211	15 fn.
Columbia Broadcasting System v. United States, 316 U. S. 407	8 fn.
Federal Communications Comm'n v. American Broadcasting Co., 347 U. S. 284	8, 11
Federal Communications Comm'n v. RCA Communications, Inc., 346 U. S. 86	11 fn.

PAGE

Felman v. United States, unreported, Civil No. 49 C 227, N. D. Ill., *aff'd* 339 U. S. 973 7

FTC v. Motion Picture Advertising Co., Inc., 344 U. S. 392 16

Thomas S. Lee Enterprises, Inc., d/b as Don Lee Broadcasting System, 5 Pike & Fischer R. R. 1179 9

Logansport Broadcasting Corp. v. United States, 210 F. 2d 24 7

Midland Broadcasting Co., 3 Pike & Fischer R. R. 1961 ..... 15 fn.

Miller v. United States, 294 U. S. 435 13

National Broadcasting Co. v. United States, 319 U. S. 190 ..... 8, 9, 16

Radio Corp. v. United States, 341 U. S. 412 7

Radio Voice of Springfield, Inc., 3 Pike & Fischer R. R. 2010 12

Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 189 F. 2d 677, *cert. denied*, 342 U. S. 830 ..... 15 fn.

Southern S. S. Co. v. NLRB, 316 U. S. 31 15

United States v. Columbia Steel Co., 334 U. S. 495 ..... 11, 12

Statutes and Regulations:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*:

Sec. 301 8

Sec. 303 7

Sec. 308 7

Sec. 309 7

Sec. 309(b) 2, 3, 5, 6, 7, 10, 16

Sec. 310 7

PAGE

Sec. 313 ..... 10, 11

Sec. 319 7

Sec. 402(a) ..... 4, 8 fn.

Sec. 402(b) 17

United States Criminal Code, 62 Stat. 763, 18 U. S. C. § 1304 8

Act of December 29, 1950, 64 Stat. 1129, Sec. 4 (5 U. S. C. 1034) 4

Federal Communications Regulations, 47 C. F. R.:

§ 3.35 ..... 4, 5

§ 3.240 ..... 4, 5

§ 3.636 ..... 2, 3, 4, 5, 10, 11, 12, 13, 14, 15 fn., 16

Miscellaneous:

FCC Sixth Report and Order, Vol. 1, Part 3, Pike & Fischer R. R. 91:645-47 ..... 14 fn

Report and Order (Docket 10822), FCC Mimeo. 10215, Sept. 17, 1954 ..... 13 fn

18 F. R. 7796 ..... 4 fn.

Hearings before Communications Subcommittee of Senate Committee on Interstate and Foreign Commerce on status of UHF and on S. 3095, 83rd Cong., 2d Sess. 142, 185-87 ..... 12 fn.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,* —*against*— STORER BROADCASTING COMPANY, *Respondent.*	No. 814

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (App. 1a-12a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered February 24, 1955 (App. 13a-14a). Petitioners invoke the jurisdiction of this Court under 5 U. S. C. 1040 and 28 U. S. C. 1254(1).

Questions Presented

On November 25, 1953, the Federal Communications Commission promulgated rules with respect to multiple ownership of broadcast stations licensed by the Commission.

Those rules, among other things, limit, by numerical proscription and without a hearing, the maximum number of interests that one person may have in radio and television broadcast stations. The numerical proscription provisions affecting applicants for television licenses became a part of § 3.636 of the Rules and Regulations of the Commission.

By a judgment of February 24, 1954, the Court of Appeals for the District of Columbia Circuit held that so much of § 3.636 as limited television licensees to a maximum ownership of five such stations violated the Communications Act of 1934. The review of that judgment sought by petitioners presents these questions:

1. Whether § 3.636 is valid

(a) When construed by the Commission to deny a license applicant the hearing provided by Section 309(b) of the Communications Act of 1934.

(b) When construed by the Commission to convert the question of the public interest in diversity of ownership into a conclusive presumption, numerically defined, that dispenses with proof and precludes dispute.

(c) When the Commission has stated only abstractly in the rule its basis and reasons for the establishment of the numerical limit.

2. Whether the grounds urged by the petition constitute a special or important reason why this Court should grant the petition.

Statute and Regulation Involved

The pertinent section of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151, *et seq.*, is as follows:

Section 309(b):

> If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309(b)]

The pertinent portions of Regulation § 3.636 *Multiple ownership* provide:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control†) if
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the

†The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.†† [47 C. F. R. 3.636]

††In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

Statement

This proceeding was instituted January 22, 1954, when respondent Storer Broadcasting Company (hereafter called Storer) petitioned under Section 402(a) of the Communications Act of 1934 (47 U. S. C. 402(a)) and Section 4 of the Act of December 29, 1950, 64 Stat. 1129, 1130 (5 U. S. C. 1034) to have set aside an order of the Federal Communications Commission. That order, adopted November 25, 1953, promulgated the revisions that are §§ 3.35, 3.240 and 3.636 of the Rules and Regulations of the Commission.* Those revised rules relate to the multiple owner-

*The Commission's Report and Order adopting the revised rules is at 18 F. R. 7796. It is printed in the Joint Appendix filed below and will be referred to there as "R. 20-38".

ship by licensees of the Commission of radio and television broadcast stations.

The revised rules impose numerical limitations on the number of stations that may be licensed to any party by providing that no license will be granted if such "would result in a concentration of control of . . . broadcast stations in a manner inconsistent with public interest, convenience, or necessity" and, "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of more than" seven standard (AM) [§ 3.35], seven frequency modulation (FM) [§ 3.240] or five television (TV) [§ 3.636] broadcast stations.*

The judgment of the Court below sets aside so much of § 3.636 as conclusively presumes that there will be a concentration of control contrary to "the public interest, convenience, or necessity" for any person to have an interest in any more than five TV broadcast stations (App. 13a-14a).

The decision of the Court of Appeals is based in chief upon Section 309(b) of the Communications Act of 1934. Although conceding that the generality of Section 309(b) is not unqualified, the Court below held that the Section in-

*On November 25, 1953, Storer was the licensee in its own name of five AM stations, five FM stations and three TV stations. Wholly owned subsidiaries of Storer were the licensees of two AM stations and two TV stations.

Petitioners properly concede, therefore, that § 3.636 adversely affects Storer; in fact, they note that on the same day the Commission adopted the amended multiple ownership rules, it dismissed, without hearing, a pending application by Storer for an additional television station in Miami (Pet. 6-7). See, also, the Petition, fn. 3.

tends "that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (App. 8a). The Court observed that the Commission may not freeze

> "... into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case." (App. 9a)

Argument

I

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT.

The Court of Appeals concluded that selection of the number "five" as the maximum figure beyond which multiple ownership of TV broadcast stations will not be permitted to go, regardless of what an applicant may be able to show in his own behalf, is contrary to the mandatory hearing provisions of Section 309(b) of the Communications Act and, with respect to the applicant, would in effect repeal or nullify that important section (App. 10a).

Section 309(b) declares that if the Commission shall be unable to find that the public interest, convenience, or necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding

> "... it shall formally designate the application for hearing on the grounds or reasons then obtaining."

The decision below does not, as suggested by petitioners (Pet. 9-11, 16), construe Section 309(b) either to bar promulgation by the Commission of general rules applicable to licensing proceedings or to require that its powers in that respect be limited to the matters specifically itemized in Section 303. It does hold, however, that the Commission may not by general rule preclude the hearing that Section 309(b) requires the Commission to grant to an applicant before it denies a license for a lawful use of an available facility. *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U. S. 327.

There is, therefore, no conflict of decision here with those cases in this Court or the court below that concede power in the Commission to promulgate general rules concerning allocation of frequencies, classification of stations and the like. *Radio Corp.* v. *United States*, 341 U. S. 412; *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24. Such rules relate to the definition of the facilities available for licensing, which precedes the determination of the persons to be licensed to operate such facilities under the licensing procedures specified in Sections 308, 309, 310 and 319 of the Communications Act.

Since the decision below does not construe Section 309(b) to require that the Commission hold a hearing before denying a license to one who concededly would operate a station in a manner violative of the Communications Act or any other Federal statute, it raises no conflict with *Felman* v. *United States*, 339 U. S. 973 (rules prohibiting licensing an applicant who proposes to transfer by

contract to a third person part of the licensee's responsibility for the operation of the station in violation of Section 301 of the Communications Act); or with *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284 (rules prohibiting licensing an applicant who proposes to broadcast lotteries in violation of Section 1304 of the United States Criminal Code). Clearly, the Commission is not required to grant a hearing to an applicant who intends to carry on activities that a statute declares are contrary to the public interest; for the statute bars the possibility of the finding, prerequisite to a grant of the license, that it would serve the public interest.

The decision below simply rules, in conformity with earlier rulings of this Court, that when the question of who should receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission authority to establish rigid classifications of applicants for licenses. In those situations, only a case-by-case analysis of all relevant factors meets the requirements of the Communications Act. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. Thus, although the chain broadcasting regulations sustained in the *NBC* case included a regulation prohibiting a network from owning or controlling more than one station in a given service area, this Court was careful to note that

> "In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U. S. at 223)*

*The decision in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, is not to the contrary. That case held that review of the order of the Commission promulgating the chain broadcasting rules was authorized by § 402(a) of the Communications Act where

The Commission's administrative application of the chain broadcasting regulations since the *NBC* case has adhered to the requirement of this Court that the Commission "exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" *Thomas S. Lee Enterprises, Inc., d/b as Don Lee Broadcasting System*, 5 Pike & Fisher R. R. 1179. This practice conforms to the Commission's representations to this Court in its brief in the *NBC* case that the chain broadcasting regulations were not "iron bound" and did not "constitute an abdication by the Commission of all discretion".*

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the bill of complaint stated a cause of action in equity. Although the Commission in that case sought to avoid judicial review of its order by claiming that the rules were akin to press releases, this Court chose to treat them as what they purported to be "—an exercise of delegated legislative power—". In so doing, however, the Court did not sanction application of the rules to particular cases without the rudiments of fair trial. Indeed, the subsequent decision in the *NBC* case made clear that the Commission must, as to each application coming before it, exercise judgment whether the grant of a license would serve the public interest.

*In its brief in the *NBC* case the Commission stated (at page 77): "Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are 'iron bound' and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience or necessity to each application for a license in the light of the facts pertinent to the application. *Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation.* In fact, the Commission has adopted rules for the specific purpose of protecting the rights of such applicants in enabling them to make such a showing if they can . . . ." [Emphasis added.]

II

THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners urge that this case raises an important Federal question, because § 3.636 is an implementation of agency policies against economic concentration and in favor of diversification of program and service viewpoints, and because those policies can be administered most conveniently in the Commission if they are embedded in *per se* doctrines or rules (Pet. 12-15, 20).

A. The Numerical Proscription Provisions of § 3.636 Do Not Implement Antimonopoly Policy or Diversification of Program and Service Viewpoints.

The Commission may not, of course, excuse default of its duties under Section 309(b) simply by extolling the policies upon which it claims the numerical proscription provisions of § 3.636 are based (Pet. 12-15). But setting aside that point, the fact is the numerical proscription provisions of § 3.636 do not implement the policies cited by the Commission. Numerical limitation of maximum station ownership neither forwards antimonopoly policy nor the policy favoring program and service diversification.

The Congress has never enacted any antimonopoly legislation applicable to broadcasting that differs in any respect from the law applicable to other business. Section 313 of the Communications Act, which the Commission has said the rules are intended to implement (R. 24), merely declares applicable to radio communications all

> "laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade."

It is admitted, of course, that the Commission has power to apply Section 313 by refusing licenses where the grant would result in a violation of any of the laws embraced by that section, and, indeed, it must take into account, in determining whether public interest requires the granting or withholding of a license in any given situation, competitive practices falling short of a positive violation of the antitrust laws. But, as this Court held in *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 290, the Commission's power to adopt general rules purporting to apply specific Federal laws is limited by the scope of those laws.

Viewed as a purported implementation of the policy of the antitrust laws, the numerical proscription provisions of §3.636 constitute a determination by the Commission that the acquisition by any one person of an interest in more than the specified number of TV stations has an economic effect contrary to such policy, without regard to the facts concerning the actual or potential effect of such acquisition upon competition.* But that determination is squarely in conflict with the express provisions of the antitrust laws that require analysis of economic consequences. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 528-29, 531.

Basic to a determination of the effect on competition of any proposed acquisition are such factors as the purpose of such acquisition, the existence, number, activity and strength of competitors in the market affected by the ac-

*The Commission will naturally consider the special nature of the communications industry in determining what activities or acquisitions may lessen competition [*Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 98], but it cannot rewrite the antitrust laws and by administrative fiat bar an acquisition having no effect or only an insubstantial effect upon competition.

quisition, the size and location of the acquiring interest and the size and location of the interest proposed to be acquired. *United States v. Columbia Steel Co., supra,* at 527-28. The numerical proscription rules preclude consideration of any such factors.

But those factors, important from the antitrust standpoint in all fields of activity, require special consideration in the field of television broadcasting. Television stations differ substantially in such important respects as their geographical location, power, frequency, population served, hours of operation, pattern of coverage, protection from interference by other stations and additional, but like, factors. *Cf. Radio Voice of Springfield, Inc.,* 3 Pike & Fischer R. R. 2010, 2014. In § 3.636, the Commission explicitly recognizes that those factors must be considered whenever an applicant has less than the specified number of stations. Its only excuse for refusing to consider them after an applicant reaches the limit is that such a course would be "unsatisfactory or unworkable." (R. 27)

To preclude by an absolute numerical limit consideration of all those variable factors departs from long-established antitrust principles and creates an arbitrary and obviously false presumption that an ultra-high frequency TV station in Butte, Montana, is to be equated with a very-high frequency station in New York City.

Apart from such considerations, inquiry into the facts would be necessary even on the Commission's theory that for purposes of the antitrust laws all stations should be regarded as equal. The Commission's present allocation plan contemplates 1,850 commercial TV stations.* A single

*Hearings before Communications Subcommittee of Senate Committee on Interstate and Foreign Commerce on the status of UHF and on S. 3095, 83rd Cong., 2d Sess. 142, 185-87.

TV station thus represents only .00054 of the number provided by existing allocations. By § 3.636, the Commission would foreclose consideration of whether the increase in ownership from .00270 to .00324 of TV stations would, under the facts of a particular case, result in conflict with the policy of the antitrust laws. That determination obviously cannot be made *in vacuo;* it clearly involves thorough study, which § 3.636 precludes, of the facts existing at the time.

The numerical proscription provisions of § 3.636 are, therefore, not only arbitrary; they are in basic and fundamental conflict with the requirement and policy of the antitrust laws that the issue of undue concentration of economic power must be determined in the light of all relevant economic facts.* As this Court has stated in holding invalid a comparable rule:

> "... The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power." *Miller* v. *United States,* 294 U. S. 435, 440.

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*Commissioner Doerfer recently stated in connection with the action of the Commission in permitting two additional UHF TV stations to be owned by multiple owners of five VHF TV stations:

> "... I am constrained to record my misgivings about linking a numerical evaluation of stations with 'undue concentration of ownership' as an unfailing guide as to what is in the public interest.
>
> "... I have grave doubts as to the wisdom of picking a 'number' without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limit of what will safeguard the public interest. ... There is not much more than intuition as the basis for the present rule." Report and Order (Docket 10822), FCC Mimeo. 10215, September 17, 1954.

Viewed as a purported implementation of the Commission's policy of program and service diversification, numerical proscription is equally invalid.

Diversification of program and service viewpoints is one of a number of entirely proper objectives of the Commission. But the numerical proscription requirement of § 3.636 bears no relation to that particular objective. Numerical proscription precludes consideration of the program and service viewpoints available in any service area; it applies to ownership of stations serving wholly different areas. By way of illustration, the maximum area served by a television station is measured by a radius of approximately 60 miles.* The fact that an applicant for a license for a television station in Miami, Florida, also has an interest in a television station in Detroit, Michigan, cannot have any conceivable relation to the question of program and service diversification in Miami, Florida.

Furthermore, the portion of § 3.636 set aside below, would, if allowed to operate, exclude an otherwise qualified applicant for a given broadcast facility in an area that is not served by any such existing facility, and that, even though there is no other qualified applicant. Similarly, numerical proscription excludes a multiple owner from areas in which there are more allocated facilities than qualified applicants and to which such owner would bring an additional viewpoint. Those results clearly are not in the public interest and exalt a formula at the expense of the public convenience.

Diversification is but one of the many factors to be considered by the Commission in determining the public

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*FCC Sixth Report and Order, Vol. 1, Part 3, Pike & Fischer R. R. 91:645-47.

interest. It includes not only radio and television, but newspapers,* magazines, theaters and similar interests, and it must, as the Commission has frequently held, yield to proof of superiority in other respects. *Aladdin Radio and Television Inc.*, 9 Pike & Fischer R. R. 1, 40. To exclude evidence with respect to all those other relevant factors simply because an applicant for a facility in one area has elsewhere acquired the maximum number permitted is to disregard the warning of this Court that an administrative agency must not place "excessive emphasis" upon a single facet of its responsibility. *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31, 47.

B. The Numerical Proscription Provisions of § 3.636 Debase Performance of the Commission's Administrative Function.

It is contended that the power to make general rules is a necessary adjunct of the Commission's licensing power (Pet. 12-20). Only by general rules, petitioners suggest, can prompt disposition of license applications be had (Pet. 15). But the Communications Act requires that the Commission bring more than a flair for dispatch to its conduct of the licensing process.

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*Petitioners suggest (Pet. 14) that § 3.636 is merely an extension of an established diversification policy favoring applicants without newspaper connections in selecting among competing applicants for a license. That policy, however, unlike the numerical proscription provisions of § 3.636, has never been treated by the Commission as an absolute prohibition [see *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211; *Midland Broadcasting Co.*, 3 Pike & Fischer R. R. 1961]; and, furthermore, it is related to diversification within the area served by the station to be licensed [*Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 189 F. 2d 677, *cert. denied*, 342 U. S. 830].

Section 309(b) of the Act, as already noted, in terms of broadcast generality, confers the right to a hearing upon applicants to whom the Commission would deny a license. The remaining sections of the Communications Act relating to licensing are, for the most part, general in nature and not clear of policy elements. When commenting upon the duties of other administrative agencies under statutes in which Congress advisedly has left flexible concepts, this Court has said that such concepts are "to be defined with particularity by the myriad of cases from the field" over which the agency has cognizance. *FTC* v. *Motion Picture Advertising Co., Inc.*, 344 U. S. 392, 394. Under the licensing provisions of the Communications Act, the expertise of the Commission was intended to play continually upon the delicate function of licensing a scarce communication medium. *National Broadcasting Co.* v. *United States*, 319 U. S. 190.

But now petitioners urge, in justification of § 3.636, that a general rule incorporating numerical proscription of multiple ownership is necessary because, unlike a case-by-case analysis, a general rule will obscure "uncertainties . . . in a realm where particular evils are not readily susceptible of proof." (Pet. 12) If each administrative agency to which Congress has given power to resolve "uncertainties . . . not readily susceptible of proof" attempts to settle those uncertainties simply by announcing general rules, the rationale for creation of the agency disappears. If blocks of license applications are, by unreflective decisions dictated by general rules, to be presumed unlawful, the purpose of having a Commission is lost. The agency may as well give way to the Congress.

* * *

We submit that this case was correctly decided below and that it is not in conflict with any decision of this Court or of any other court. The judgment here is that of the Court of Appeals of the District of Columbia Circuit, the court to which Congress has seen fit to confine all appeals from licensing proceedings in the Commission. [47 U. S. C. § 402(b)] Such limitation of review to the court below entitles its rulings on the licensing procedures of the Communications Act to particularly great weight.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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